No. (1)

Supreme Court, U.S.
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In The Supreme Court of the United States

HILTON MINCY,

Petitioner,

v.

SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION MAHANOY, PENNSYLVANIA and the DISTRICT ATTORNEY OF LYCOMING COUNTY, PENNSYLVANIA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

A. WHETHER THE DISTRICT COURT ERRED IN CONCLUDING THAT DEFENSE COUNSEL WAS NOT CONSTITUTIONALLY INEFFECTIVE IN NUMEROUS WAYS, INCLUDING FAILING TO INTERVIEW, OBTAIN STATEMENTS FROM, AND CALL SEVERAL IMPORTANT ALIBI AND FACT WITNESSES AT TRIAL AS WELL AS FAILING TO PROPERLY AND ADEQUATELY IMPEACH THE VICTIM AND OTHER PROSECUTION WITNESSES?

B. WHETHER THE DISTRICT COURT ERRED IN CONCLUDING THAT PETITIONER'S OTHER CLAIMS OF COUNSEL INEFFECTIVENESS LACKED MERIT?

C. WHETHER PETITIONER HAS DEMONSTRATED BOTH CAUSE FOR THE PROCEDURAL DEFAULT OF CERTAIN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS AS WELL AS ACTUAL PREJUDICE?

D. WHETHER THE DISTRICT COURT ERRED IN CONCLUDING THAT THE STATE PCRA COURT CORRECTLY REFUSED TO HOLD AN EVIDENTIARY HEARING INTO PETITIONER'S CLAIMS OF INEFFECTIVENESS?

PARTIES TO THE PROCEEDING

The parties to this proceeding are: Hilton Mincy, the Petitioner herein, by and through his counsel of record, William C. Costopoulos, Esquire, and the Superintendent, State Correctional Institution Mahanoy, Pennsylvania and the District Attorney of Lycoming County, Pennsylvania, the Respondents herein, by and through their counsel of record, Michael Dinges, the District Attorney of Lycoming County, Pennsylvania.

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REFERENCES TO OPINIONS BELOW

The United States District Court for the Middle District of Pennsylvania filed an unreported memorandum opinion on May 18, 2006 in support of its order denying the habeas corpus petition which is reproduced in the Appendix beginning at page A2.

STATEMENT OF JURISDICTION

This petition for a writ of certiorari is from the order of the United States Court of Appeals for the Third Circuit entered on March 19, 2007 denying the application for a certificate of appealability pursuant to 28 U.S.C. § 2253(c)(1). See Appendix at page A1.

Your Honorable Court has jurisdiction of this petition pursuant to sections 1254(1) and 1651 of Title 28, United States Code, 28 U.S.C. §§ 1254(1) and 1651.

CONSTITUTIONAL PROVISION

Sixth Amendment to the United States Constitution

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

This petition for a writ of certiorari to the Third Circuit arises from the denial of the application for a certificate of

appealability filed by the Petitioner, Hilton Mincy; the District Court had denied his petition for writ of habeas corpus as well as a certificate of probable cause for appeal.

After a three-day jury trial starting on May 11, 1998, Petitioner was convicted in the Court of Common Pleas, Lycoming County, Pennsylvania, of attempted murder, aggravated assault for causing serious bodily injury, aggravated assault for causing bodily injury with a deadly weapon, conspiracy and recklessly endangering another person; he was acquitted of possessing a firearm and possessing an instrument of a crime.

The convictions stemmed from an incident in which one Albert Johnson was shot three times (chest, abdomen and back) in a home in Williamsport, Pennsylvania at about 9:30 p.m. on September 19, 1997. Petitioner was not alleged to have been the actual shooter but rather an accomplice of the actual shooter, who was never identified or apprehended. According to the Commonwealth, Petitioner and Mr. Johnson had a verbal altercation outside a bar earlier that evening.

On September 28, 1998 Petitioner was sentenced to 17 to 40 years' incarceration on the attempted murder charge; the other counts merged for sentencing purposes. He timely appealed to the Superior Court of Pennsylvania. The appeal was denied by Superior Court in an order and memorandum opinion filed on February 27, 2001. No petition for allowance of appeal was filed to the Supreme Court of Pennsylvania.

Petitioner, pro se, filed a post-conviction relief act (PCRA)

petition on October 22, 2001; counsel was appointed and an amended petition was filed on March 25, 2002. An evidentiary hearing was held on December 10, 2002. On June 26, 2002, the trial court issued an order giving notice of its intent to dismiss the PCRA petition. On December 10, 2002 the Court dismissed the PCRA petition.

A timely appeal was taken to the Superior Court of Pennsylvania. Superior Court denied the appeal in an order and opinion filed on January 9, 2004 affirming the order denying the PCRA petition. He timely filed a petition for allowance of appeal to the Supreme Court of Pennsylvania. On or about September 16, 2004, the Supreme Court denied allocatur.

Petitioner timely filed a petition for writ of habeas corpus on February 8, 2005 pursuant to 28 U.S.C. § 2254 in the U.S. District Court for the Middle District of Pennsylvania. Respondents filed a response on May 20, 2005.

By memorandum opinion and order filed on May 18, 2006, United States District Court Judge Christopher Conner denied the petition for writ of habeas corpus and held that there was no basis for the issuance of a certificate of appealability. See Appendix at page A2. By order dated August 25, 2006, the District Court granted the Petitioner's unopposed motion pursuant to Fed.R.A.P. 4(a)(6) to reopen the appeal period for a period of fourteen days from the date of the order.

Mr. Mincy timely filed a notice of appeal to the United States Court of Appeals for the Third Circuit on August 28, 2006. He then filed an application for a certificate of appealability

pursuant to 28 U.S.C. § 2253. By order dated March 19, 2007, the Third Circuit denied the application for a certificate of appealability. See Appendix at page A1.

Petitioner now timely files this petition for a writ of certiorari with Your Honorable Court.

REASONS FOR ALLOWANCE OF WRIT

A. THE DISTRICT COURT ERRED IN CONCLUDING THAT DEFENSE COUNSEL WAS NOT CONSTITUTIONALLY INEFFECTIVE IN NUMEROUS WAYS, INCLUDING FAILING TO INTERVIEW, OBTAIN STATEMENTS FROM, AND CALL SEVERAL IMPORTANT ALIBI AND FACT WITNESSES AT TRIAL AS WELL AS FAILING TO PROPERLY AND ADEQUATELY IMPEACH THE VICTIM AND OTHER PROSECUTION WITNESSES.

In its decision dismissing the habeas petition, the District Court concurred with the state courts that Mr. Mincy's trial counsel did not deprive him of the effective assistance of counsel. This reasoning is highly debatable among reasonable jurists for the reasons that follow and the Third Circuit should have granted a certificate of appealability. The standard for reviewing a claim of ineffective assistance is well known:

"First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so

serious as to deprive the defendant of a fair trial, a trial whose result is credible." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "[T]he defendant must show that counsel's representation fell below an objectionable standard of reasonableness" meaning "reasonableness under prevailing professional norms." *Id.* at 688.

As the Third Circuit has summarized: "In a state prisoner's habeas petition alleging ineffective assistance of counsel, state court findings of fact made in the course of determining an ineffectiveness claim are subject to the deference requirement of § 2254(d), so long as they are fairly supported by the record." *Berryman v. Morton*, 100 F.3d 1039, 1094-1095 (3d Cir.1996)(citations omitted). "[A] state court's conclusion that counsel rendered effective assistance 'is not a finding of fact binding on the court to the extent required by 28 U.S.C. § 2254(d).' Effectiveness is not a question of historical fact. As noted earlier, an inquiry into effectiveness of counsel under *Strickland* has two components, performance and prejudice, and it is a mixed question of law and fact." *Id.* "[I]t is apparent that a state court's finding that counsel had a trial strategy is a finding of fact to which the habeas corpus court must afford the presumption of correctness if that factual finding is supported by the record. However, the question of whether counsel's strategy was reasonable goes directly to the performance prong of the *Strickland* test, thus requiring the application of legal principles, and de novo review." 100 F.3d at 1095.

On the question of whether trial counsel was ineffective for failing to investigate and call witnesses on behalf of his client, the Court determines whether counsel had a strategy; if so,

whether that strategy was reasonable; and whether the record supports the trial court's conclusion that he did. See *Berryman v. Morton, supra* (trial counsel, in state proceeding, ineffective for failing to investigate and call certain defense witnesses; he had no strategy); *United States v. Baynes*, 687 F.2d 659, 667, 668 (3d Cir.1982)("[t]he exercise of the utmost skill during trial is not enough if counsel has neglected the necessary investigation and preparation of the case or failed to interview essential witnesses or to arrange for their attendance"; trial counsel's performance was unreasonable; "[t]he mere possibility that the investigation of the exemplar might have produced nothing of consequence for [the] defense cannot serve as justification for the failure to perform such an investigation.").

Applying this law to the case *sub judice*, it is certainly debatable among jurists of reason that Mr. Mincy's trial lawyer rendered him constitutionally effective assistance by failing to investigate and call several witnesses in support of his alibi defense at trial and, as a matter of fact and law, his lawyer was ineffective. As averred in the habeas petition, Petitioner points with specificity to these non-investigated, non-called witnesses:

First, trial counsel failed to interview, obtain statements from or call as alibi witnesses Alicia and Erica (last names unknown) of 333 Campbell Street, Williamsport, who would have testified that they were with Petitioner during the time the victim was shot; counsel did not even bother interviewing them, N.T. 5/11/98, page 13, lines 5-7. Trial counsel, however, included them in his notice of alibi defense.

Second, trial counsel failed to interview, obtain statements from or call as an alibi witness Shaquona Short of Williamsport. Ms. Short testified at the PCRA hearing that she and a friend (Keeva Dandridge) were with Petitioner at the time of the shooting, which testimony directly contradicted that of the prosecution witness, Chris Johnson. N.T. 12/10/02, pages 15, 17-18, 20. Chris Johnson (not to be confused with the victim, Albert Johnson) testified that Petitioner had not been to his residence on the day in question. Ms. Short testified that she had never been contacted by anyone during the time of trial, N.T. 12/10/02, pages 15-18. Further, trial counsel submitted Ms. Short's name to the Court as Keshawn Mills, N.T. 5/11/98, Page 15. Ms. Short testified that she never went by the name Keshawn Mills, N.T. 12/10/02, pages 33-34. Petitioner had submitted Ms. Short's name and address to his lawyer months prior to the trial.

Third, trial counsel failed to interview, obtain statements from or call Hikeem Grady as to his conversation in the Lycoming County Prison with the victim, Albert Johnson, and Kem Rhodes. The victim told Mr. Grady in the presence of Mr. Rhodes that he wanted a message delivered to the Petitioner: the victim wanted $5,000 not to testify. The Petitioner informed counsel of this conversation and that Mr. Rhodes did not want to testify for fear of retaliation. For reasons still not known, counsel had Mr. Rhodes interviewed instead of Mr. Grady. Mr. Rhodes in fact gave a statement acknowledging the conversation and stated that he did not want to testify. Mr. Grady informed him that he was willing to talk to the detectives and testify (the Commonwealth had ignored the request to turn over this statement). Trial counsel never attempted to have Mr.

Grady interviewed, although the county prison is just two blocks from the courthouse. Mr. Grady died after trial, in 2000.

Fourth, trial counsel failed to interview, obtain statements from or call Juay Brockenbaugh as a witness. She sent the Petitioner a letter dated November 9, 1997 in which the victim, Albert Johnson, had asked her to inform Petitioner that he wanted $5,000 in order not to testify at trial. The reference to "Chris" is the prosecution witness, Chris Johnson, who testified that he really did not know Petitioner and that Petitioner was not at his residence on the day of the shooting. Trial counsel admitted to PCRA counsel, Gregory Stapp, that he had spoken to Ms. Brockenbaugh around the time of Petitioner's trial but could not recall why he had not called her to testify.

Fifth, trial counsel failed to interview, obtain statements from or call as a witness Jesus Flores to testify as to his conversation with the victim, Albert Johnson, at the county prison regarding the $5,000 he wanted from the Petitioner to not testify. Mr. Flores was a federal prisoner at the time and his name had been provided to trial counsel before trial. It is believed that Mr. Flores has been released and returned to his native Mexico.

Notwithstanding these fact-specific allegations as to non-investigated, non-called critical witnesses, the District Court simply held that

> Mincy failed to supply the court with any affidavit or objective proof that the alleged non-called witnesses were willing to testify. Further, when he took the second bite at this apple

> during the course of the PCRA proceedings, the court reiterated that "[t]he defendant's own affidavit only creates a factual issue with respect to counsel's knowledge; it does not establish any other requirements." Specifically, "[t]he defendant's affidavit asserts that Hikeem Grady, Jesus Flores, Juay Brokenbaugh, and Kim Rhodes told him that Johnson stated that he would not testify if the defendant paid him $5,000. However, these statements are hearsay. The defense needed to provide a certification from Grady, Flores, Brockenbaugh or Rhodes to get Johnson's statement into evidence at a PCRA hearing." "As in the defendant's direct appeal, there is no objective proof that any non-called witness was willing to testify favorably, if at all."

See Appendix at p. A25.

Petitioner cannot submit affidavit statements from his jail cell. The reason he retained private counsel at considerable expense was for counsel to go and interview the witnesses whose names were supplied by Mr. Mincy himself. The very fact that counsel failed to do so makes manifest his ineffectiveness. It is clear as day in the transcripts from the May 11, 1998 hearing that his lawyer failed to interview and obtain statements from any of the aforementioned witnesses. Who was supposed to get these statements if the Petitioner was locked up?

In addition, Petitioner respectfully submits that in fact he has offered objective proof in support of his claims not only through his own affidavit which, the state court even admits, created a factual issue with respect to counsel's knowledge, but through independent evidence including the fact that several of the names were included on trial counsel's notice of alibi defense filed of record with the trial court itself. This is evidence and it cannot, nor should it be, so easily ignored and brushed aside. It is flatly untrue that there "was no evidence" submitted to substantiate the claim that these witnesses were willing and able to testify on Mr. Mincy's behalf at trial in support of his alibi defense, contrary to the District Court's finding.

Petitioner has established that the aforementioned witnesses existed; that they were available and willing to testify; that trial counsel knew or should have known of their existence; and that the absence of their testimony prejudiced him. This is all he need do. *Berryman v. Morton, supra.*

Consider the following evidence supporting his claims regarding these witnesses. First, the letter provided by Ms. Brockenbaugh demonstrated that she had contact with Alicia and Erica of Campbell Street. Prison and court records show the locations of Jesus Flores and Hikeem Grady at the time of trial. Ms. Brockenbaugh's letter and trial counsel's admission that he spoke to her attest to the fact that she existed.

Second, all the witnesses were available and willing to testify at trial. Hikeem Grady and Jesus Flores were incarcerated at the county prison. Juay Brockenbaugh's letters show that she

was living in the Williamsport area at the time. Alicia and Erica of Campbell Street had been contacted by Juay Brockenbaugh at the same time.

Third, trial counsel knew or should have known of the existence of these witnesses. He certainly knew about Alicia and Erica because he included them on the notice of alibi defense. Trial counsel had been provided with the letter from Ms. Brockenbaugh and has admitting speaking to her. Hikeem Grady's name had been provided by the Petitioner and trial counsel, in having Mr. Rhodes interviewed, had knowledge of both him and Mr. Grady. And Mr. Rhodes, in his statement, mentions that Mr. Grady was willing to come forward.

And fourth, the Petitioner was prejudiced by the absence of the testimony of these witnesses and was denied a fair trial; had the jury heard their testimony, it may well have accepted his defense of alibi and acquitted him of all charges. Alicia and Erica were alibi witnesses who would have contradicted the prosecution witness, Chris Johnson, and testified that the Petitioner had not been to his house that day or at the time of the shooting. Shaquona Short could have provided crucial information at the trial. That she testified her recollection was less than perfect affects only the weight of that evidence.

The witnesses Brockenbaugh, Grady and Flores would have impeached the victim's credibility; the victim had denied his previous statements, testified to numerous inconsistencies and perjured himself. He had an extensive criminal record and had numerous pending charges; he had been a victim of two shootings within a week. All this goes to the victim's

credibility which was especially critical because he and he alone was the only piece of evidence tying the Petitioner to this crime.

The failure to investigate and call these exculpatory witnesses at trial by Mr. Mincy's lawyer raises a substantial showing of the deprivation of a constitutional right, and thus an appealability certificate should have been issued and the claim reviewed on the merits by the Third Circuit. This Honorable Court is respectfully asked to grant a writ.

B. THE DISTRICT COURT ERRED IN CONCLUDING THAT PETITIONER'S OTHER CLAIMS OF COUNSEL INEFFECTIVENESS LACKED MERIT WHEN THEY AT LEAST ARE DEBATABLE AMONG REASONABLE JURISTS.

Failure to Impeach the Victim

Further, Petitioner argues that trial counsel was ineffective for failing to impeach the victim, Albert Johnson, and to thoroughly cross-examine him as to his numerous inconsistencies and the recantation of his previous statements. For example, Mr. Johnson stated more than once on the record that the door to the residence was "kicked in" (N.T. 5/11/98, page 35, 71). Mr. Johnson also stated this in his police statements and preliminary hearing testimony. However, Agent Sorage and Trooper Kirkendall both testified that there was no damage to the door (N.T. 5/11/98, page 76 and 5/12/98, page 98).

Mr. Johnson also testified that only the Petitioner shot at him (N.T. 5/11/98, page 61). But in his police statement he stated

that the "cousin" shot first and that it was the "cousin" who shot at him and pursued him down the stairs (N.T. 5/11/98, page 40), but he later testified that it was the Petitioner who pursued him down the stairs (N.T. 5/11/98, page 61) and that it was not the "cousin" but it was Petitioner who shot him (N.T. 5/11/98, page 76). He even stated that he looked back and saw the "cousin" shoot at him (N.T. 5/11/98, page 40). This is internally self-contradictory.

In his police statement, Mr. Johnson said that he lived on Washington Blvd. but he testified that he lived in the residence in which he was shot (N.T. 5/11/98, page 34). But his cousin, Salina Johnson, testified that only she and her sister and Chanelle Johnson (and her 2 year old) lived there (N.T. 5/12/98, page 47). The victim also testified that there was a safe in the house (N.T. 5/11/98, page 60) but before he had told the police that he did not know that there was a safe in the house (N.T. 5/11/98, page 77).

The victim contended that he got shot on the staircase in the home while running down the stairs (N.T. 5/11/98, pages 40, 41, 62). He also stated that he fell into the entertainment center at the bottom of the staircase (N.T. 5/11/98, page 62), and that no shots fired in the back of the house hit him. Agent Sorage testified that there were no shots fired on the staircase and that there was no possible way that anyone was shot on the staircase; there was no blood trail on the stairs or the entertainment center, and the entertainment center had not been disturbed. Trooper Kirkendall also testified to this (N.T. 5/11/98, pages 100-104).

The victim further contended that he could identify the "cousin" and that it was the "cousin" present at the Shamrock Bar earlier but he later testified that he did not see the cousin's face or what he was wearing (N.T. 5/11/98, page 48). He even stated that later, at the scene of the shooting, it was the "cousin" who was there in a hooded sweatshirt and that the hood of the sweatshirt covered the cousin's face (N.T. 5/11/98, page 49). Yet he admitted that the hood had no slits in it and that he did not know how it was possible for the cousin to see out of the hood. And the victim stated that the "cousin" had a black hooded sweatshirt but Karriema Morrison, the Commonwealth witness, testified that the person with the Petitioner was wearing an all-green mechanic's suit.

The District Court, in reviewing this contention, held that it was without merit: "The court concluded that regardless of the substance of the inconsistent statements, Mincy would still be held accountable based on theories of accomplice or co-conspirator liability. There is no indication that this conclusion was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding such that Mincy would be entitled to relief on this ground." See Appendix at p. A26. When an inconsistency is as material as this, that is, the victim sometimes identifying Mr. Mincy as the shooter and other times as "the cousin," it goes to the very heart of the prosecution's theory of the case and can't be swept under the proverbial rug by resort to weak rationalizations involving esoteric theories of criminal culpability. For this is evidence of actual innocence.

At bare minimum this is the kind of evidence that warrants

encouragement to proceed further and consider the claim on the merits. A certificate of appealability should have been granted on this issue and it should have been entertained by the Third Circuit on the merits.

In addition, Mr. Mincy respectfully contends that trial counsel was ineffective for failing to impeach the victim when he denied that drugs had been found on his person (N.T. 5/11/98, pages 52, 79, 85, 89). Mr. Johnson stated that there were "no" drugs in the residence or on his person. He testified he recalled "exactly" what happened that night (N.T. 5/11/98, page 69). However, drugs (crack cocaine) were found on his person (in his pants) at the hospital and trial counsel was ineffective for failing to interview and call the hospital attendant who found the drugs on him.

The state court found that calling independent witnesses to establish that the victim possessed crack cocaine on his person at the time of the shooting would not have affected the outcome of the trial. The District Court agreed: "Mincy fails to convince that the state court's conclusion was contrary to the evidence presented." See Appendix at p. A26. This conclusion is erroneous because the victim's repeated denial of illegal drug possession, contrary to independent evidence not heard by the Petitioner's jury, directly affected his credibility in accusing Mr. Mincy of either being the actual shooter or an accomplice to the actual shooter.

Failed to Impeach Commonwealth Witness Karriema Morrison and to Object to Use of Prior Statement

Moreover, Mr. Mincy maintains that trial counsel failed to

adequately and properly impeach the Commonwealth witness, Karriema Morrison, who denied the statements she had given to the police, and for failing to object to the prosecution allowing her to read her prior statement to the jury into the record. The Commonwealth did not satisfy the test because her present memory was not shown to be inadequate. Ms. Morrison stated that prior to testifying, she met in the District Attorney's Office and reviewed her statement and informed them it was incorrect. Her present testimony, therefore, was correct and consistent to what she told the prosecutor before trial.

Also, the writing must be able to refresh the witness's memory in order to be introduced. However, this writing could not possibly refresh Ms. Morrison's memory because she stated that she did not recall saying it and because she stated that her prior statements were incorrect (N.T. 5/12/98, page 29).

And third, the writing must actually refresh the witness's memory. This prong was not met either. Ms. Morrison stated that she was "sure" that she did not recall her prior statements at the police station. In fact throughout her testimony, she denied every part of her prior statement and said that she had been threatened to make statements against the Petitioner. (N.T. 5/12/98, pages 34-35, 48). Ms. Morrison even testified that she informed the Petitioner by letter that she recalled everything that happened the night of the shooting (N.T. 5/12/98, page 47).

Here, the Commonwealth purposely got Ms. Morrison to read her prior statement into the record when she did not want to

testify as they wanted her to and, when she continued to offer truthful testimony, they played the tape of her prior statement for the jury. Mr. Mincy was prejudiced by this procedure and counsel's failure to object. On appeal, the Pennsylvania Superior Court held that: "Ms. Morrison then read her statement and answered questions through her refreshed memory. Therefore Morrison was correctly allowed to read her police statement." See mem. op. at 7. This is not what happened. Although her memory had been refreshed, she testified that her prior statements were incorrect and that she had been threatened. (N.T. 5/12/98, pages 19-52).

Indeed, the Superior Court held that "yet the jury found her [Ms. Morrison] credible." See mem. op. at 7. Had trial counsel properly and adequately impeached her credibility, including with the letter she had written, no jury would have found her to be a credible witness. The District Court "finds no error with the use of this witness' prior statement." See Appendix at p. A27. This erroneous conclusion is debatable among reasonable jurors because it conflicts with rudimentary rules of evidence. A certificate should have been issued.

Failure to Object to Refusal to Remove Tainted Juror

Further, during trial, a juror admitted reading a newspaper headline about the Petitioner contrary to the Court's instructions; the article discussed his being charged with other crimes and contained inaccuracies. N.T. 5/13/98, pages 2-3. Although this juror did not read the content of the article, the headline in and of itself was sufficiently prejudicial to warrant the juror's removal; the juror did not have to read the content of the article in order for the juror to prejudice Mr. Mincy's right

to a fair trial.

Trial counsel, however, failed to object to the Court's refusal to remove this juror from the panel and seat an alternate juror. Because the juror was exposed to a prejudicial newspaper headline over the Petitioner having been charged with unrelated crimes, trial counsel was ineffective for failing to object to the juror remaining on the panel. Again, the District Court just wrote that "Mincy fails to demonstrate that the court's conclusion was based on an unreasonable determination of the facts in light of the evidence presented. Therefore, he is not entitled to relief on this ground." See Appendix at p. A27-28. This is arguably erroneous.

Failure to Object to Improper and Prejudicial Jury Instructions

Mr. Mincy's last claim of ineffectiveness addressed by the District Court involved jury instructions. Twice in the instructions to the jury the trial court referred to the alleged accomplice and the actual shooter of the victim as the Petitioner's "cousin":

> a) "I will refer to the other individual as an unknown black male. There's been some reference whether he was a cousin or not of the defendant." N.T. 5/11/98, page 151;
>
> b) "Now my final instruction on the conspiracy concept. I do want to point out to you if you do believe the Defendant's cousin or the unknown black male committed the crime or crimes, that the Defendant was in his company

> at the scene and knew he was committing the crime, you cannot infer from these facts alone, in other words by simple presence or knowledge, that the Defendant was guilty of conspiracy." N.T. 5/11/98, page 155.

By referring to the "unknown black male" as the "cousin" of the Petitioner, the Court improperly and prejudicially linked the Petitioner to the shooting and undermined his defense of alibi.

Yet, in its opinion, the Court denied making such a reference:

> In his testimony, the victim referred to the defendant's companion as his 'cousin.' Other witnesses disputed whether the individual was the defendant's cousin. In an attempt to avoid confusion, the Court generally referred to [t]his individual as the unknown black male. The Court never stated the other individual was, in fact, the defendant's cousin.

See June 26, 2002 op. at 20; emphasis supplied. The Court clearly referred to "the Defendant's cousin" as "the unknown black male," making it interchangeable and literally putting Mr. Mincy at the scene of the shooting, contrary to its later opinion.

The problem was, however, there is no evidence that the actual shooter, the alleged accomplice, in fact was the Petitioner's "cousin" and it was highly improper for the trial judge to have twice referred to him as such. Trial counsel was ineffective for failing to object, move for a mistrial and ask for cautionary instructions; appellate counsel was ineffective for

failing to pursue this claim on direct appeal. And Mr. Mincy was clearly prejudiced by these omissions of counsel because the jury undoubtedly was swayed by the Court itself linking him to the actual shooter and alleged accomplice by improperly referring to this individual as the Petitioner's "cousin" and all but telling the jury to disregard his defense of alibi.

In considering this serious claim, the District Court evaded addressing it, writing as follows:

> The trial court clearly indicated that there was contradictory evidence concerning whether the accomplice was Mincy's cousin and therefore, alternatively identified the individual as "an unknown black male." As noted by the PCRA court, the trial court never expressly stated that the accomplice was, in fact, Mincy's cousin. Further, as recognized by the superior court, Mincy was clearly identified as one of the assailants and the identity of the companion did not alter Mincy's guilt. Accordingly, his request for relief on this ground will be denied.

See Appendix at p. A28-29. Any reasonable reading of the trial judge's instructions leads to the indisputable conclusion that the actual shooter was clearly and repeatedly identified as none other than the Petitioner's cousin, which placed Mr. Mincy himself at the crime scene and undermined his defense of alibi. There can be no other *reasonable* reading of what Mr. Mincy's jury was told by the Court. And it is submitted that *reasonable* jurists would find this issue debatable.

C. PETITIONER HAS DEMONSTRATED BOTH CAUSE FOR THE PROCEDURAL DEFAULT OF CERTAIN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS AS WELL AS ACTUAL PREJUDICE.

The District Court ruled that several of Mr. Mincy's ineffectiveness claims were procedurally defaulted because they were not presented to the state courts. As the Third Circuit has summarized this Court's law on cause-and-prejudice in the habeas context:

> Claims barred on state procedural grounds cannot be reviewed on habeas unless the "prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claim will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). Cause must be "some objective factor external to the defense." *Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 91 L.Ed. 2d 397 (1986).
>
> * * *
>
> Attorney error that rises to the level of ineffective assistance under the Sixth Amendment establishes external "cause" to overcome a procedural default. *Murray*, 477 U.S. at 488, 106 S.Ct. 2639; *see also Werts v. Vaughn*, 228 F.3d 178, 193 (2000).

Fischetti v. Johnson, 384 F.3d 140, 153, 154 (3d Cir.2004). Mr. Mincy respectfully maintains that there was both cause for the procedural defaults in the nature of attorney ineffectiveness as well as prejudice emanating therefrom. All the issues below were either raised for the first time in the state supreme court by Petitioner pro se, raised by PCRA counsel in the amended petition or raised for the first time in the Superior Court appeal; some were wrongly abandoned by counsel at various phases. Hence, they were both preserved and exhausted.

In addition, it must emphasized that in the state supreme court, Mr. Mincy himself *layered the claims as to PCRA counsel ineffectiveness*, which contradicts the District Court's findings otherwise. He expressly raised counsel's ineffectiveness for abandoning his claims: those in the PCRA petition, those in the state superior court, and those raised in the state superior court but not properly briefed and argued. Also, several of these issues should have been "stayed" by the courts in order to allow the Petitioner to go back to the trial PCRA court and then, if needed, to the state superior court specifically in relation to PCRA counsel's ineffectiveness. The District Court seriously erred and the Third Circuit should have granted a certificate of appealability and considered all these ineffectiveness claims on their respective merits.

Trial and PCRA Appellate Counsel Ineffectiveness

PCRA appellate counsel rendered Petitioner ineffective assistance by failing to pursue several ineffectiveness claims, which constituted "cause" for the procedural default. First, trial counsel was ineffective for failing to bring to the attention of the Court and the jury the victim's extensive criminal record

and probation violations, particularly his threatening of a witness charge in an unrelated case in Williamsport in July 1997; he had numerous pending, open charges against him when he testified against Mr. Mincy at trial.

Second, trial counsel was ineffective for failing to aggressively challenge the Commonwealth's theory as to the commission of the crime. Karriema Morrison, the prosecution witness, testified that Mr. Mincy arrived at her mother's house, at which the Petitioner resided in the Williamsport area, at around 9:30 p.m. (N.T. 5/11/98, page 20) and stayed about 30 minutes (N.T. 5/11/98, page 41). The victim testified that Mr. Mincy and the "cousin" came to the residence where he was and stayed 15 minutes. He testified that he got shot sometime between 9:40 and 9:45 p.m. However, there is no way that Petitioner could have been in two places at the same time. Even assuming that he had been at Ms. Morrison's mother's house at around 9:15 p.m. (15 minutes earlier than she said), it would still have been humanly impossible for him to have shot the victim when the victim said he had been shot. Trial counsel did not bring this discrepancy to the jury's attention.

Third, trial counsel failed to adequately and properly impeach the Commonwealth witness, Karriema Morrison, who denied being "high" on pills on the night of the shooting and writing a letter to Petitioner subsequently in which she stated that she had been "high." (N.T. 5/12/98, pages 37, 41, 46-48). Petitioner provided defense counsel with a copy of this letter on April 15, 1998 but counsel lost it and never used it to cross-examine her. Mr. Mincy attempted to get another copy of the letter from New Jersey during trial but, by the time it came through the

courthouse fax machine, closing arguments had already begun.

Petitioner was prejudiced by trial counsel's performance because, had he done what he should have done, as alleged above, the jury may well have accepted his alibi and found him not guilty. And had these issues been presented on appeal, he may well have been awarded a new trial.

Appellate Counsel and PCRA/Appellate Counsel Ineffectiveness

In addition, Petitioner has argued that his appellate counsel was ineffective in handling his direct appeal in the state court in several ways, which also constitutes "cause" for procedural default. In denying Mr. Mincy's direct appeal, the Superior Court wrote: "In the process he [Mr. Mincy] expressly admits the victim was assaulted and implicitly admits that he ordered his companion to hold the gun to the victim's head." See mem. op. at 10, n. 7. Appellate counsel, in his pathetic brief, had actually argued that Petitioner should not have been found guilty of attempted homicide because his intent was to commit a simple assault. See brief at 11. Mr. Mincy has always maintained that he did not shoot the victim and did not order any companion to hold a gun to the victim's head, nor did he ever make any such admissions or statements. His defense was alibi and remains alibi: he was not at the scene of the shooting. Appellate counsel was constitutionally ineffective for making this unauthorized, specious argument not grounded in fact.

Second, appellate counsel made the ludicrous argument that trial counsel was ineffective for failing to call Keeva Dandridge as a witness on his behalf when in fact she did testify. Superior

Court rightly termed this line of argument "bizarre." See mem. op. at 6-8 and n. 5. What appellate counsel failed to do is buttress his argument as to the other alibi and impeachment witnesses whom trial counsel failed to call at trial. Superior Court held as follows:

> Here, appellant vaguely contends that trial counsel was ineffective for failing to investigate and call "witnesses." Appellant named at least eight witnesses that [sic] trial counsel should have interviewed or called during the post-trial phase . . . . Within that list, our review indicates that Keena Dandridge is really Keeva Dandridge and did testify at trial, supra at 6-7. Kim Rhodes was not willing to testify for the defense. Chris Johnson testified for the Commonwealth at trial and admitted that he had been interviewed by appellant's trial counsel which belies appellant's contention that he would have been an alibi witness. Further, we have not been directed to nor can we find any affidavit or objective proof that any non-called witness was willing to testify favorably, if at all. We find appellant has failed [to] meet the above requirements for any named witness with his unsubstantiated allegations.

See mem. op. at 12; citations omitted. Hence, appellate counsel was ineffective on direct appeal.

Appellate counsel was further ineffective for failing to

develop the line of argument as to trial counsel's handling of the victim's testimony. As Superior Court wrote:

> The same heading of appellant's brief also alleges ineffectiveness in trial counsel's performance in cross-examination of the victim and in failing to examine prior inconsistent statements of the victim. However, the argument section does not set forth what should have been done on cross-examination or what the prior inconsistent statements were.

See mem. op. at 13. Appellate counsel mentioned Juay Brockenbaugh but never provided the letters written to Mr. Mincy in which the victim asked her to inform him that he (the victim) would not testify for money. He also failed to reference the statement of Mr. Rhodes, who confirmed the conversation between Mr. Grady and the victim in which the victim asked Mr. Grady to inform Petitioner that he wanted $5,000 to not testify. Finally, appellate counsel failed to preserve for appellate review and to raise on direct appeal a number of issues that Mr. Mincy had requested that he raise and brief. This constituted attorney ineffectiveness to the point of prejudice. *Strickland, supra.*

Trial Counsel Ineffective for Failing to Object to Juror Who Witnessed Petitioner in Handcuffs and Appellate Counsel Ineffective for Failing to Pursue Issue

During trial, a juror saw the Petitioner being escorted, apparently in handcuffs, by the sheriff or a deputy sheriff. Trial counsel did not object and there was an investigation and

sidebar conference on the record. N.T. 5/13/98, pages 35-39. It is well settled that it is inherently prejudicial for a juror to witness a defendant, who is presumed innocent as a matter of constitutional right, in shackles, handcuffs or other restraints and in the company of law enforcement agents. Some courts, such as the Third Circuit, have held that there is no prejudice if the jurors *briefly* see the defendant in handcuffs during the course of a trial. See, e.g., *United States v. Chrzanowski*, 502 F.2d 573, 576 (3d Cir.1974)(citations omitted). It is not clear, however, from the existing record whether the view of Mr. Mincy in handcuffs was merely fleeting or brief or whether it was more extended and involved. If the latter, then he was clearly prejudiced by the sighting.

The trial court erred in accepting the juror's lame assertion that it would not have prejudiced his ability to be fair and impartial; in the high-pressure environment of such a "conference," the juror was merely saying what he was expected to say. The juror should have been dismissed because he necessarily was prejudiced by seeing the sheriff or deputy sheriff escort the Petitioner, evidently in handcuffs, during the trial, thereby stripping Mr. Mincy of his presumption of innocence in that juror's mind and preventing him from deciding the Petitioner's guilt or innocence in a fair, impartial and just manner.

D. THE DISTRICT COURT ERRED IN CONCLUDING THAT THE STATE PCRA COURT CORRECTLY REFUSED TO HOLD AN EVIDENTIARY HEARING INTO PETITIONER'S CLAIMS OF INEFFECTIVENESS.

During the PCRA hearing, the Court denied Mr. Mincy's request to question trial counsel as to why he did not interview, obtain statements from or call to the stand the witnesses set forth above, including those listed in the notice of alibi defense, and to question appellate counsel as to why he filed such a pathetic brief and failed to raise and brief many appellate issues. When a prisoner alleges the ineffectiveness assistance of counsel and makes credible allegations against counsel, he has a right to an evidentiary hearing in order to prove those claims. The burden shifts to the Commonwealth to establish that counsel's stewardship was constitutionally sound. By refusing to allow the Petitioner here to question his prior counsel, the Court prevented him from offering proof in support of his claims.

In denying relief on this issue, the District Court opined that there is no authority that a denial of such a hearing violates federal law and Petitioner failed to comply with the procedural requirements set forth in 42 Pa.C.S.A. § 9545(d)(1). See Appendix at p. A29-30. Multiple problems abound with this reasoning.

First, the failure to provide a signed certification as to each witness as required by 42 Pa.C.S.A. § 9545(d)(1), which also includes the substance of that witness's testimony, does not apply to the trial lawyer whose stewardship is being challenged. A defendant cannot be expected to know what his former lawyer will say and, in fact, the former lawyer is the prosecution's witness at a PCRA evidentiary hearing. The lack of a witness certification renders that witness' testimony inadmissible according to the statute; it does not mean that a

PCRA court can deny a defendant an evidentiary hearing involving his former lawyer's testimony.

Numerous Pennsylvania cases hold that a PCRA court is required statutorily to hold an evidentiary hearing unless the petition is frivolous and patently without support, *Commonwealth v. Weddington*, 522 A.2d 1050, 1052 (Pa.1987); where a defendant claimed counsel was ineffective for failing to pursue an entrapment defense, a remand for an evidentiary hearing was ordered, *Commonwealth v. Jones*, 640 A.2d 1330, 1335 (Pa.Super.1994); a remand for evidentiary hearing was ordered in a PCRA case where the trial judge, as fact finder, did not have the opportunity to view the demeanor and evaluate credibility of alibi witness that defense counsel did not call at trial, *Commonwealth v. Khalifah*, 852 A.2d 1238 (Pa.2004); a PCRA court must conduct evidentiary hearing into claim of racial discrimination in selection of jurors, *Commonwealth v. Jones*, 876 A.2d 380 (Pa.2005); an evidentiary hearing was required to determine whether trial counsel deprived defendant of right to appeal, *Commonwealth v. White*, 674 A.2d 253, 257 (Pa.Super.1996); and where a claim of ineffectiveness of counsel is of arguable merit, the PCRA court is required to hold an evidentiary hearing to determine the basis for counsel's act or omission, *Commonwealth v. Stanley*, 632 A.2d 871, 872 (Pa.1993)("In view of the mystery surrounding counsel's actions, a hearing should have been held.").

These cases collectively stand for the proposition that where a defendant, as Mr. Mincy has here, makes credible allegations of attorney ineffectiveness against his trial lawyer, he is entitled to an evidentiary hearing in the state post-conviction court.

There is no procedural hurdle to this entitlement, contrary to the District Court's view. Not only is such a hearing mandated by Pennsylvania law and the corresponding rules of criminal procedure, but the right to an evidentiary hearing into the deprivation of the Sixth Amendment right to the effective assistance of counsel carries and implicates Federal constitutional and due process concerns as well.

CONCLUSION

Wherefore, Petitioner, Hilton Mincy, for the foregoing reasons, respectfully requests that Your Honorable Court grant him a writ of certiorari.

Respectfully submitted:

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COUNSEL OF RECORD FOR PETITIONER

DATED: May 31, 2007.

No. 01-[illegible]

In The Supreme Court of the United States

HILTON MINCY,

Petitioner,

v.

SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION MAHANOY, PENNSYLVANIA and the DISTRICT ATTORNEY OF LYCOMING COUNTY, PENNSYLVANIA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

C.A. No. 06-3905

HILTON MINCY

v.

SUPERINTENDENT STATE CORRECTIONAL INSTITUTION at MAHANOY, PENNSYLVANIA; et al

(M.D.Pa.Civ.No. 05-CV-00273)

PRESENT: SLOVITER, CHAGARES AND NYGAARD, CIRCUIT JUDGES

ORDER

The foregoing application for a certificate of appealability is denied. Appellant has not made a substantial showing of the denial of a constitutional right with respect to his ineffective assistance of counsel claims as required by 28 U.S.C. § 2253. The District Court's finding that his remaining claims are procedurally defaulted does not appear to be debatable. See Slack v. McDaniel, 529 U.S. 473, 478 (2000).

By the Court,

/s/ Richard L. Nygaard
Circuit Judge

Dated: March 29, 2007.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

HILTON MINCY,	: CIVIL ACTION NO. 1:05-CV-
Petitioner	: 0273
	:
v.	: (Judge Conner)
	:
SUPERINTENDENT,	:
STATE CORRECTIONAL	:
INSTITUTION MAHANOY	:
PENNSYLVANIA, et al.,	:
Respondents	:

MEMORANDUM

Presently before the court is a counseled petition for writ of habeas corpus (Doc. 1) in which petitioner, Hilton Mincy ("Mincy")[1], challenges a Pennsylvania state conviction. For the reasons set forth below, the petition will be denied.

I. Statement of Facts

The following statement, which is extracted from an opinion of the Superior Court of Pennsylvania, succinctly sets forth the pertinent factual background:

On September 19, 1997, at or around 8:30

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1 In this proceeding, petitioner is identified as "Mincy." However, some of the documents contained in the state court record identify him as "Mincey."

p.m., appellant engaged in a verbal altercation with the victim, Albert Johnson, outside the Shamrock bar in Williamsport. Both men wanted to fight and when appellant attempted to take off his watch, the victim took a swing at him but missed. The victim's female companion intervened pushing the victim into her vehicle located nearby. The vehicle containing the victim immediately left the scene but during the departure, appellant yelled, "this ain't over." N.T., 5/13/98, at 40-42.

At or around 9:00 or 9:30 p.m., appellant and a companion arrived at the residence owned by Kariemma [sic] Morrison's mother located at 622 Second Street. Present in the house at appellant's arrival were Karriema Morrison, her friend "Howey", and an unidentified friend of Howey's. Immediately after appellant and his companion entered the house, the companion entered the kitchen and began asking Howey's friend whether he was Albert Johnson. Appellant's companion eventually pulled a gun. At this point, appellant intervened stating "don't shoot him, he ain't Albert." N.T., 5/12/98, at 23. Appellant then looked around the house for Albert Johnson and interrogated Karriema Morrison regarding Albert Johnson's whereabouts. Appellant and his companion soon left the residence; their stay extended approximately 15 minutes.

Shortly thereafter, or approximately 9:30 p.m., Albert Johnson was watching television and drinking beer at 750 Second Street when appellant and his companion kicked in the front door, the companion again with gun drawn, and told the victim not to move. Appellant demanded the whereabouts of the guns, cocaine, and money. Johnson answered that he had no idea what appellant was talking about. Appellant began a search of the house. During the search, appellant had the victim lie on the floor and had his companion point the gun at the back of the victim's head. When the victim tried to roll over, the companion struck the victim in the head with a barrel of the gun. Appellant directed his companion to bring Johnson on their search of the upstairs. During this time, the victim continued to have the gun pointed at the back of his head. In one upstairs bedroom, appellant began searching the drawers and again inquired where the guns were; the victim continued to plead ignorance. After pulling out all of the drawers in the room and not finding guns, drugs, or money, appellant instructed his companion to "go ahead and bust him son." N.T., 5/11/98, at 39-40. Under the impression that he was bout [sic] to be shot, Johnson pushed the companion away and attempted to flee down the steps. The victim's escape failed as appellant's companion opened fire and repeatedly hit him.

Johnson was shot in three places: the chest, abdomen, and back. Despite the gunshot wounds, he made it to a neighbor's house, who refused to assist, and he then wandered out towards the street. Soon thereafter, the police were called and the paramedics summoned. The victim was transported to the emergency room. The seriousness of his injuries required surgery and resulted in a colonostomy and the removal of a portion of his bowel.

On September 20, 1997, appellant was apprehended and charged with the following offenses: attempted homicide, possession of a firearm, possession of an instrument of a crime, aggravated assault for causing serious bodily harm, aggravated assault for attempting or causing serious bodily injury with a deadly weapon, recklessly endangering another person, simple assault for attempting or causing bodily injury and simple assault for negligently causing bodily injury with a deadly weapon. Meanwhile, appellant's companion has not been identified or prosecuted. On February 19, 1988, the trial court allowed appellant's information to be amended to include a count for criminal conspiracy.

A three-day jury trial commenced on May 11, 1998. The jury returned a guilty verdict on the following: attempted murder, aggravated assault

for causing serious bodily harm, aggravated assault for causing serious bodily injury with a deadly weapon, conspiracy and reckless endangerment of another person. Appellant was acquitted of the charges for possessing a firearm and possessing an instrument of crime.

On September 28, 1998, appellant was sentenced to a period of state incarceration with a minimum term of 17 years and a maximum term of 40 years for attempted murder. The court determined that the convictions for aggravated assault and recklessly endangering merged for sentencing purposes while the conspiracy count was an inchoate offense pursuant to the Pennsylvania Crimes Code, 10 Pa.C.S.A. § 101 et seq., and did not justify an additional sentence.

(Doc. 9-2, pp. 1-5).

Following his sentencing, Mincy filed a motion to reconsider his sentence. The trial court instructed him to wait until he was appointed appellate counsel to file the motion. Although appellate counsel was subsequently appointed, the reconsideration motion was never re-filed.

Mincy then challenged his judgment of sentence in the trial court. The trial court upheld the judgment on June 30, 1999. (Doc. 9-7). He appealed to the superior court raising the following relevant issues: whether trial counsel was ineffective

for failing to conduct a proper investigation and to call witnesses; whether trial counsel was ineffective in failing to impeach the victim; and whether the trial counsel was ineffective in failing to object to the trial court's decision not to remove a juror who admitted reading about Mincy in a newspaper headline during the course of the trial. (Doc. 9-2, pp. 5-6). The judgment was affirmed on February 27, 2001. (Doc. 9-2). No petition for allowance of appeal was filed. (Doc. 1, p. 2).

On October 22, 2001, Mincy filed a petition pursuant to the Post Conviction Relief Act ("PCRA"). Counsel was appointed and an amended petition was filed on March 25, 2002. On June 26, 2002, the PCRA Court notified the parties that it intended to dismiss the amended PCRA petition. (Doc. 9-3). An order of dismissal was entered on December 10, 2002. (Doc. 9-4, p. 1). Mincy timely appealed rasing the following pertinent issues: whether the PCRA court erred in denying Mincy's request to continue the hearing to develop the issue of trial counsel's failure to interview or call certain witnesses; whether the PCRA court erred in failing to grant the petition based on ineffective assistance of counsel, and whether the PCRA court erred in denying the petition in light of the fact that Mincy had filed a motion for reconsideration of his sentence and the lower court failed to accept his motion before appeal counsel was appointed. On January 9, 2004, the superior court affirmed the dismissal of the PCRA petition. Mincy filed a petition for allowance of appeal. On September 16, 2004, the supreme court denied allocatur.

The present petition was filed on February 8, 2005.

II. Claims presented in federal petition

In the instant petition, Mincy raises ineffective assistance of trial and appellate counsel, and abuse of discretion on the part of both the trial and PCRA courts.

A. Ineffective Assistance of Counsel

1. Trial Counsel

Mincy contends that trial counsel was ineffective for failing to investigate and call certain witnesses at trial, namely, Alicia and Erica (last names unknown), Shaquona Short (also known as Keshawn Mills), Hikeem Grady, Juay Brokenbaugh, and Jesus Flores. (Doc. 1, pp. 4-8). This issue was included in his direct appeal. (Doc. 9-2). The superior court, which considered the issue to be "vaguely" presented, stated that "we have not been directed to nor can we find any affidavit or objective proof that any non-called witness was willing to testify favorably, if at all. We find appellant has failed to meet the above requirements for any named witness with his unsubstantiated allegations. Commonwealth v. Lopez, 739 A.2d 485 (Pa.1999); Commonwealth v. Copenhefer, 719 A.2d 242, 254 (Pa.1998)." Id. at p. 12.

Mincy again raised the issue in the PCRA proceedings. The PCRA court concluded that he was not entitled to relief because the issue was previously litigated on direct appeal, 42 Pa.C.S.A. § 9543(a)(3). (Doc. 9-3, p. 6 (citing Commonwealth v. Mincey, 1595 HBG 1998, at 11-13)). Moreover, if the issue had not been previously litigated, it would have been deemed waived since it could have been raised on appeal, 42 Pa.C.S.A. §

9544(b). (Id.). The PCRA court also noted that, even if the issue was properly preserved, no evidentiary hearing would have been necessary because the defense "failed to submit a certification from any of the alleged alibi witnesses as required by Section 9545(d)(1)." [2] (Id. at p. 7). Mincy did not pursue the issue during PCRA appellate proceedings. (Doc. 9-16).

Mincy also argues that trial counsel was ineffective for failing to impeach the victim, Albert Johnson, as to "his numerous inconsistencies and the recantation of his previous statements." (Doc. 1, p. 8). However, not all of the alleged inconsistencies set forth in his federal petition were presented to the state courts. Specifically, Mincy did not raise counsel's failure to impeach the victim concerning the location of his actual residence, or counsel's failure to expose the victim's extensive criminal record, in the state court proceedings.

The remaining issues were presented both in the direct appeal and in the PCRA proceeding. On direct appeal, the superior court noted that although Mincy argues that there were inconsistent statements made by the victim, he failed to identify

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2 "Where a petitioner requests an evidentiary hearing, the petition shall include a signed certification as to each intended witness stating the witness's name, address, date of birth and substance of testimony and shall include any documents material to that witness's testimony. Failure to substantially comply with the requirements of this paragraph shall render the proposed witness's testimony inadmissible." 42 Pa.C.S.A. § 9545(d)(1). The court notes with interest that the PCRA court afforded the defense additional time to secure affidavits or certifications.

the nature of the statements.[3] The court concluded that regardless of the substance of the inconsistent statements, which in all likelihood involved the victim's statements that he did not know whether the defendant or his cousin was the shooter, Mincy would still be accountable based on theories of accomplice or co-conspirator liability. (Doc. 9-7, pp. 9, 10).

This issue was revisited during the PCRA proceedings. At that time, the ineffectiveness claims relating to the failure to impeach the victim concerned the condition of the front door of the victim's cousin's apartment, whether shots were fired from the stairs, and the fact that the victim identified the companion as Mincy's cousin even though the victim did not see the companion's face. (Doc. 9-4, p. 7). The PCRA court found that "the trial's outcome was not prejudiced by these alleged inconsistencies because the record establishes that [Mincy] entered the apartment with the accomplice and shot the victim. The amount of force used to gain entry, the exact location of the shooter(s), and [c]ompanion's actual identity affect only the manner which the crime was executed, not [Mincy's] guilt." (Doc. 9-4, pp. 7-8).

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3 The superior court adopted the trial court opinion on this issue. (Doc. 9-2, p. 13)("[T]he argument section does not set forth what should have been done on cross-examination or what the prior inconsistent statements were. While other parts of the brief purport to show the bias of the victim and prior inconsistent statements, every such allegation was addressed at length and correctly by the trial court in its post-trial opinion. Trial Court Opinion, 6/30/99, at 7-11. We adopt that portion of the trial court's opinion refuting appellant's contentions of ineffectiveness.")

His contention that trial counsel was ineffective, for failing to challenge the victim's statement that he did not have drugs on his person the night of the shooting (Doc. 1, p. 10), was presented in the PCRA proceedings. (Doc. 9-3, p. 10). Trial counsel repeatedly asked the victim on cross-examination whether there were drugs on his person during or after the incident. (Doc. 9-3, p. 10, citing N.T., 5/11/98, at 52, 79, 84-85). Further, the court observed that an appropriate method of impeachment would have been to call the witness or witnesses who found the drugs on the victim's person or were present when the drugs were found. Although counsel did not pursue this issue in the manner suggested (albeit *post facto*), the PCRA court concluded that it would not have affected the outcome of the trial. The PCRA court based its conclusion on the re-direct examination of Mr. Johnson, during which he testified that while "he was in the hospital he was in a lot of pain and he was not aware of anybody taking drugs from his person." N.T., 5/11/98, at 85-87." (Doc. 9-3, p.11).

Mincy also raises two ineffectiveness claims with regard to witness Karriema Morrison ("Morrison"). (Doc. 1, pp. 11-13). The claim that trial counsel failed to impeach Morrison, by suggesting that she was "high" on pills the night of the shooting and that she had written a letter to Mincy stating that she had been high, was also presented in the PCRA petition. (Doc. 1, p. 11; Doc. 9-3, p. 8). However, this issue was not pursued on appeal of the denial of the petition.

Mincy also argues that trial counsel was ineffective for failing to object to the prosecution's use of a prior statement to refresh Morrison's recollection. (Doc. 1, p. 11). In considering the

argument, the PCRA court stated that prior to allowing a witness to have his or her testimony refreshed, "[t]he proponent must establish that: 1) the witness's present memory is inadequate; 2) the writing or other aid could refresh the witness's memory and 3) the writing or other aid actually refreshes the witness's memory." (Doc. 9-4, p. 6). Mincy's argument failed because Morrison had conceded that she did not know whether Mincy's companion had a gun and she couldn't remember what she told police about the incident. She then read her statement, which refreshed her recollection. In addition, the witness was thoroughly cross-examined regarding any inconsistencies in her testimony. (Doc. 9-4, p. 7).

Mincy claims that trial counsel's failure to object to the trial court's refusal to remove a juror, who admitted reading a newspaper headline about Mincy's case, constituted ineffective assistance of counsel. (Doc. 1, p. 17). This issue was presented during the direct appeal and addressed by the superior court as follows:

> The trial court concluded that since the juror did not read the article, its content could not have affected his ability to be a fair and impartial juror. Therefore, trial counsel was not ineffective for failing to object. Trial Court Opinion 6/30/99, at 10.
>
> We find the trial court's analysis consistent with precedent. Our situation is substantially similar to the facts in Commonwealth v. Reese, 352 A.2d 143 (Pa.Super.1975). In Reese, two

> jurors read an article printed about the defendant during the trial and were excused. Another saw the article or headline but immediately knew it was about the defendant and put it down. This juror was allowed to stay on the jury. On appeal, the court stated that since no member of the jury that convicted appellant had read the article, there was no prejudice to appellant. Id. at 146-47. As in Reese, nobody on the jury that convicted appellant had read the article and therefore, appellant suffered no prejudice.

(Doc 9-2, p. 14).

Mincy contends that trial counsel was ineffective for failing to object to the trial court's failure to dismiss a juror who witnessed him being escorted by the sheriff or deputy. (Doc. 1, p. 18). This issue was not presented to the state courts.

Mincy also takes issue with trial counsel's failure to object to the trial court's reference in the jury instructions to the alleged accomplice as Mincy's cousin. (Doc. 1, p. 19). The trial court pointed out that although the victim referred to Mincy's companion as his cousin, other witnesses disputed this fact. "In an attempt to avoid confusion, the Court generally referred to this individual as the unknown black male. The Court never stated the other individual was, in fact, the defendant's cousin." (Doc 9-3, p. 20). On appeal, the superior court reasoned that Mincy was identified as one of the assailants and the identity of the companion did not alter Mincy's guilt. (Doc 9-4, p. 8).

2. Ineffective Assistance of Counsel

Mincy raises a number of ineffective assistance of counsel claims. He contends that appellate counsel was ineffective in his handling of the direct appeal in that he impliedly admitted Mincy's guilt, failed to preserve issues for appeal, and erroneously argued that trial counsel was ineffective for failing to call certain witnesses who, in fact, testified at trial. (Doc. 1 p. 13). Neither of the latter two issues was presented to the state courts. Appellate counsel's alleged ineffectiveness for impliedly admitting his guilt was presented in the PCRA petition and considered by the PCRA court. However, Mincy did not present this issue in the PCRA appeal to the superior court.

He also avers that appellate counsel was ineffective for failing to raise trial counsel's failure to object to the court's refusal to dismiss a juror who witnessed Mincy being escorted by the sheriff or deputy sheriff. (Doc. 1, p. 18). This issue was not presented to the state courts.

Lastly, Mincy claims that appellate counsel was ineffective for failing to raise and preserve for review the trial court's reference to the accomplice as Mincy's cousin while charging the jury. (Doc 1, p. 19). As noted previously, the superior court reasoned that Mincy was identified as one of the assailants and the identity of the companion did not affect the finding of guilt. (Doc 9-4, p. 8).

B. Trial Court Abuse of Discretion

Mincy contends that the trial court abused its discretion by refusing to accept his motion to modify/reconsider his sentence and by deferring any motions until the appointment of appellate counsel. (Doc. 1, p. 17). This issue was rejected by the superior court during the PCRA proceedings. The superior court acknowledged that Mincy timely filed a *pro se* motion to reconsider his sentence and that the trial court instructed him to wait until he was appointed counsel to file the motion. (Doc 9-4, pp. 8-9). The PCRA court deemed the issue waived pursuant to 42 PA. CONS. STAT. § 9544(b) because Mincy could have raised the trial court's failure to address the motion to reconsider on direct appeal, but did not. (Doc. 9-9, pp. 1-2). Mincy raised the issue in his appeal of the denial of PCRA relief and the superior court also deemed the issue waived. (Doc 9-4, p. 8).

C. PCRA Court Abuse of Discretion

Mincy contends that the PCRA court's decision to deny his request for an evidentiary hearing was an abuse of discretion. (Doc. 1, p. 15). The PCRA court held an argument on the amended petition, in which Mincy sought an evidentiary hearing. (Doc. 9-3, p. 5). Mincy failed to include a certification of witnesses, as required by 42 PA.C.S.A. § 9545(d), which states as follows:

> (1) Where a petitioner requests an evidentiary hearing, the petition shall include a signed certification as to each intended witness stating the witness's name, address, date of birth and substance of testimony and shall include any

> documents material to that witness's testimony. Failure to substantially comply with the requirements of this paragraph shall render the proposed witness's testimony inadmissible.

42 Pa.C.S.A. § 9545(d)(1). Notwithstanding this omission, counsel was afforded an additional forty-five days to submit the required information. Although Mincy submitted his own affidavit, and letters dated November 9, 1997 and December 27, 1997, he failed to meet the requirements for an evidentiary hearing.

Mincy appealed the PCRA court's decision. The superior court considered the issue and stated as follows:

> There is no right to an evidentiary hearing pursuant to the PCRA. Commonwealth v. Camps, 772 A.2d 70, 75 (Pa.Super.2001). When requesting an evidentiary hearing on this issue, the petitioner must include a signed certification as to each intended witness, including the witness's name, address, date of birth and the substance of the proposed testimony. Commonwealth v. Brown, 767 A.2d 576, 582 (Pa.Super.2001). Appellant has failed to provide this information, therefore his request was rightfully denied.
>
> Moreover, Appellant is not eligible for PCRA relief on this previously litigated issue. See PA.C.S.A. § 9543(a)(3). An issue has been

> previously litigated if the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue. See 42 PA.C.S.A. § 9544(a)(2). The instant issue has already been rejected on direct appellate review. See Commonwealth v. Mincey, No. 1595 Harrisburg 1998, unpublished memorandum at 11-13 (Pa.Super. filed February 27, 2001).

(Doc. 9-4, pp. 4-5).

III. Discussion

A habeas corpus petition pursuant to 28 U.S.C. § 2254 is the proper mechanism for a state prisoner to challenge the "fact or duration" of his confinement. Preiser v. Rodriguez, 411 U.S. 476, 498-499 (1973). "[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." Estelle v. McGuire, 502 U.S. 62, 67-8 (1991). Rather, federal habeas review is restricted to claims "on the ground that [petitioner] is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. 2254(a); Estelle, 502 U.S. at 67-8 (1991); see Pulley v. Harris, 465 U.S. 37, 41 (1984); Johnson v. Rosemeyer, 117 F.3d 104 (3d Cir.1997).

A. Habeas Exhaustion Requirements

Habeas corpus relief cannot be granted unless all available state remedies have been exhausted, or there is an absence of

available state corrective process, or circumstances exist that render such process ineffective to protect the rights of the applicant. See 28 U.S.C. § 2254(b)(1). The exhaustion requirement is grounded on principles of comity in order to ensure that state courts have the initial opportunity to review federal constitutional challenges to state convictions. See Werts v. Vaughn, 228 F.3d 178, 192 (3d Cir.2000).

A state prisoner exhausts state remedies by giving the "state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established review process." O'Sullivan v. Boerckel, 526 U.S. 838, 844-45 (1999). Respect for the state court system requires that the petitioner demonstrate that the claims in question have been "fairly presented to the state courts." Castille v. Peoples, 489 U.S. 346, 351 (1989). Fair presentation also requires the petitioner to raise the claim in a procedural context in which the state courts can consider it on the merits. Id.

If a petitioner presents unexhausted habeas claims to a federal court, but state procedural rules bar further state court review, the federal court will excuse the failure to exhaust and treat the claims as exhausted. McCandless v. Vaughn, 172 F.3d 255, 260 (3d Cir.1999); Wenger v. Frank, 266 F.3d 218, 223 (3d Cir.2001); Lines v. Larkins, 208 F.3d 153, 160 (3d Cir.2000); see Teague v. Lane, 489 U.S. 288, 297–98 (1989). Although deemed exhausted, such claims are considered procedurally defaulted. Coleman v. Thompson, 501 U.S. 722, 749 (1991); McCandless, 172 F.3d at 260; Lines, 208 F.3d at 160.

A federal habeas court cannot review the merits of

procedurally defaulted claims unless the petitioner demonstrates either cause for the procedural default and actual prejudice, or that a fundamental miscarriage of justice will result if the court does not review the claims. See McCandless, 172 F.3d at 260; Coleman, 501 U.S. at 750-51; Caswell v. Ryan, 953 F.2d 853, 861-62 (3d Cir.1992). To demonstrate cause for a procedural default, the petitioner must show that some objective external factor impeded petitioner's efforts to comply with the state's procedural rule. See Murray v. Carter, 477 U.S. 478, 488 (1986). To demonstrate actual prejudice, the petitioner must show "not merely that the errors created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting the entire proceeding with error of constitutional dimensions." See United States v. Frady, 456 U.S. 152, 170 (1982).

Alternatively, a federal court may excuse a procedural default if the petitioner demonstrates that failure to review the claim will result in a fundamental miscarriage of justice. See Edwards v. Carpenter, 529 U.S. 446, 451 (2000); Wenger, 266 F.3d at 224. The miscarriage of justice exception applies only in extraordinary cases where a "constitutional violation has probably resulted in the conviction of one who is actually innocent." Murray, 477 U.S. at 496.

In the matter *sub judice*, Mincy failed to present to the state courts the following ineffective assistance of trial counsel claims: failure to impeach the victim concerning the actual location of his residence and extent of his criminal record; failure to challenge "aggressively" the Commonwealth's theory of the case; and failure to object to the trial court's decision not

to dismiss a juror who, during the trial, witnessed him being escorted by the sheriff or deputy sheriff. Mincy also failed to present to the state court the following issues of appellate counsel's ineffectiveness raised in the state courts: failure to raise the issue of trial counsel's failure to object to the trial court's refusal to dismiss a juror who, during the trial, witnessed him being escorted by the sheriff or deputy sheriff raised in state court (Doc. 1, pp. 18-19); failure to preserve issues for appeal; and wrongly arguing that trial counsel was ineffective for failing to call witnesses who, in fact, testified at trial (Doc. 1, p. 13).

In addition, Mincy failed to exhaust the claims that trial counsel was ineffective, for failing to cross-examine witness Kariemma Morrison about whether she was under the influence of narcotics on the night in question, and that appellate counsel was ineffective for impliedly admitting Mincy's guilt. (Doc. 1, pp. 11-13). While both of these issues were presented in the PCRA petition and considered, Mincy did not pursue these issues in the PCRA appeal.

Procedural rules bar Mincy from pursuing these issues in state court.[4] Accordingly, he has procedurally defaulted on these

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4 The time period for filing a second PCRA has expired. See 42 PA. CONS. STAT. § 9545(b)(1)(setting for a one year limitations period). Mincy raises no argument, and the record suggests no possibility, that his claims fall within an exception to the limitations period for filing a petition under the PCRA petition. See 42 PA. CONS. STAT. § 9545(b)(1)(permitting petitions to be filed more than one year after judgment if the

claims and the court may not consider the merits unless he establishes "cause and prejudice" or a "fundamental miscarriage of justice" to excuse his default. McCandless, 172 F.3d at 260. Mincy has not even averred cause for or prejudice by the default and he has not demonstrated his actual innocence such that a lack of review by the court would constitute a fundamental miscarriage of justice. Id. Consequently, he is precluded from pursuing federal habeas corpus relief with regard to all of these itemized issues.

Mincy also seeks relief on the ground that the trial court abused its discretion by not considering and granting his *pro se* motion to modify/reconsider his sentence and that this denial was in violation of his due process and procedural rights. (Doc. 1, pp. 17-18). This issue was not preserved for review. Mincy first raised the issue in his appeal to the Pennsylvania Superior Court from the trial court's denial of his PCRA petition. Under Pennsylvania law, the claim is waived because it could have been raised at an earlier stage of the proceeding. 42 PA. CONS. STAT. § 9544(b)("[A]n issue is waived if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state postconviction proceeding"). Indeed, the superior court refused to address the issue because it was raised for the first time in his appellate brief on collateral review. Thus, this claim is procedurally defaulted based upon an "independent and adequate ground."

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failure to raise the claim is attributable to government interference, the facts underlying the claim could not have been ascertained previously, or the claim involves rights newly recognized and retroactively applied by the Supreme Court).

Coleman v. Thompson, 501 U.S. 722, 729-30 (1991); Slutzker v. Johnson, 393 F.3d 373, 381 (3d Cir.2004); Barnhart v. Kyler, 318 F.Supp. 2d 250, 257-259 (M.D.Pa.2004). Moreover, because he has not alleged "cause and prejudice" or a "miscarriage of justice," review of this procedurally defaulted state claim is foreclosed.

The claims that were properly exhausted for federal habeas corpus purposes will now be addressed on the merits.

B. Habeas Claims

Section 2254(d) of Title 28 of the United States Code provides, in pertinent part, that an application for a writ of habeas corpus premised on a claim previously adjudicated by the merits in state court shall not be granted unless:

> (1) [the decision] was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) [the decision] was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

28 U.S.C. § 2254(d). To establish that the decision was "contrary to" federal law "it is not sufficient for the petitioner to show merely that his interpretation of Supreme Court precedent is more plausible than the state court's; rather, the

petitioner must demonstrate that Supreme Court precedent requires the contrary outcome." Matteo v. Superintendent, 171 F.3d 877, 888 (3d Cir.1999). Similarly, a federal court will only find a state court decision to be an "unreasonable application" of federal law if the decision, "evaluated objectively and on the merits, resulted in an outcome that cannot reasonably be justified under existing Supreme Court precedent." Id.. Further, factual determinations made by the state court are "presumed to be correct." 28 U.S.C. § 2254(e)(1). A petitioner may only rebut this presumption with "clear and convincing evidence" of the state court's error. Id.; Thomas v. Varner, 428 F.3d 492, 497-98 (3d Cir.2005).

1. Ineffective Assistance of Counsel

To sustain a claim for ineffective assistance of counsel, a petitioner must show that counsel's performance was objectively deficient and that this deficient performance prejudiced his or her defense. See Strickland v. Washington, 466 U.S. 668,687 (1984).[5] In evaluating whether counsel's performance was deficient, the court must defer to counsel's tactical decisions, avoiding "the distorting effects of hindsight," and give counsel the benefit of a strong presumption of reasonableness. See id. at 689; Gov't of the Virgin Islands v. Weatherwax, 77 F.3d 1425, 1431 (3d Cir.1996).

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5 The performance and prejudice prongs of Strickland may be addressed in either order, and, "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice. . . that course should be followed." Strickland, 466 U.S. at 697.

Mincy does not take issue with the state court's application of federal law. Rather, he contends that the state court decisions were based on unreasonable determinations of the facts in light of the evidence presented in state court. See 28 U.S.C. § 2254(d)(2).

(a) Trial Counsel

Mincy contends that the decision concerning the failure to investigate/call witnesses was based on an unreasonable determination of the facts in light of the evidence presented in state court because he has established that the witnesses existed, that they were willing to testify, that counsel knew or should have known of their existence, and that the absence of their testimony prejudiced him. (Doc. 1, p. 6). This claim is without merit. In considering the issue during the direct appeal, the superior court stated as follows:

> To prevail on an ineffectiveness claim, appellant must plead and prove the following: (1) the claim is of arguable merit; (2) counsel's performance was unreasonable; (3) but for counsel's act or omission the outcome of the proceedings would have been different. Commonwealth v. Henry, 706 A.2d 313, 323 (Pa.1997). Further, if the ineffectiveness claim is for failing to call a witness, appellant must also show: (1) the witness existed; (2) the witness was available to testify; (3) counsel knew or should have known of the existence of the witness; (4) the witness was willing to

> testify for the defense; and (5) the absence of the witness' testimony was so prejudicial as to have denied the defendant a fair trial. Id. at 329.

(Doc. 9-2, pp. 11-12). As in Part I, *supra*, Mincy failed to supply the court with any affidavit or objective proof that the alleged non-called witnesses were willing to testify. Further, when he took his second bite at this apple during the course of the PCRA proceedings, the court reiterated that "[t]he defendant's own affidavit only creates a factual issue with respect to counsel's knowledge; it does not establish any of the other requirements." (Doc. 9-3, p. 8). Specifically, "[t]he defendant's affidavit asserts that Hikeem Grady, Jesus Flores, Juay Brokenbaugh, and Kim Rhodes told him that Johnson stated he would not testify if the defendant paid him $5,000. However, these statements are hearsay. The defense needed to provide a certification from Grady, Flores, Brokenbaugh or Rhodes to get Johnson's statement into evidence at a PCRA hearing." (Doc. 9-3, p. 8, n. 4). "As in the defendant's direct appeal, there is no objective proof that any non-called witness was willing to testify favorably, if at all." (Id. at p. 8).

Review of the state court opinions (Docs. 9-2, 9-3, 9-7), and Mincy's state court briefs (Docs. 9-15, 9-16), confirms that there simply was no evidence submitted in support of the requirement that he demonstrate that the witnesses were available and willing to testify, *via* affidavits or otherwise. He is not entitled to habeas relief on this claim.

Mincy also argues that the state court decision concerning the victim's "numerous inconsistencies and the recantation of his

previous statements" was unreasonable because his pretrial statements concerning the identity of the shooter and his testimony at trial were "internally self-contradictory." (Doc. 1, pp. 8-9). This claim is without merit. The court concluded that regardless of the substance of the inconsistent statements, Mincy would still be accountable based on theories of accomplice or co-conspirator liability. (Doc. 9-7, pp. 9, 10). There is no indication that this conclusion was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding such that Mincy would be entitled to relief on this ground.

Also related to the victim's testimony is Mincy's contention that trial counsel was ineffective for failing to interview and call the hospital attendant concerning drugs found on the victim at the hospital. He is not entitled to relief on this claim either. Trial counsel repeatedly questioned the victim during cross-examination about the drugs. On re-direct examination the victim stated that he was in a lot of pain at the hospital and was not aware of anyone taking drugs from his person. This testimony led the court to conclude that calling the witnesses would not have affected the outcome of the trial. Further, the responding police officer testified that plastic bags containing what appeared to be crack cocaine were retrieved from the victim's clothing. (Doc. 9-11, pp. 61-63). Mincy fails to convince that the state court's conclusion was contrary to the evidence presented.

The court now turns to the testimony of witness Kariemma Morrison. Review of Morrison's trial testimony affirms that the PCRA court's conclusion was based on a reasonable

determination of the facts in light of the evidence presented. When questioned by the prosecution about the gun, Morrison could not recall whether Mincy's companion had a gun, but informed the prosecutor that reviewing the transcript of her interview with the police officer would refresh her recollection. (Doc. 9-11, pp. 22-23). She testified on direct examination about her encounter with Mincy and his companion, the fact that they were looking for the victim, the possession of a gun and the commotion surrounding the shooting. (Id. at pp. 23-32).

During cross-examination, she testified that she did not actually see the gun but, rather, her friend, who was also present, told her that there was a gun. (Id. at p. 40). On redirect, she conceded that she did not inform the police officer who took her statement that her knowledge of the gun was not first-hand knowledge. (Doc. 9-11, p. 48). In fact, during the interview, she gave the officer a description of the gun that was used that night. (Id.). The court finds no error with the use of this witness' prior statement.

It is also averred that trial counsel was ineffective for failing to object to the trial court's refusal to remove a juror who admitted reading a prejudicial newspaper headline about Mincy. He argues that, even though the juror did not read the contents of the article, the juror was exposed to a prejudicial headline stating that he was charged with unrelated crimes and trial counsel's failure to object constituted ineffective assistance. (Doc. 1, p. 17). The record reflects that the juror saw the bold print headline but did not read the contents of the newspaper article; there is no indication that the headline, in and of itself,

was prejudicial. (Doc. 9-13, pp. 2-3). Hence, Mincy fails to demonstrate that the court's conclusion was based on an unreasonable determination of the facts in light of the evidence presented. Therefore, he is not entitled to relief on this ground.

Relief will also be denied with respect to the claim that trial counsel was ineffective for failing to object to the trial court's reference in the jury instructions to Mincy's cousin as the actual shooter. It is Mincy's position that by referring to the shooter as his cousin, "the Court improperly and prejudicially linked the Petitioner to the shooting and undermined the defense of alibi." (Doc. 1 p. 20). He contends that the court clearly referred to "the Defendant's cousin" as "the unknown black male," making it interchangeable and placing Mincy at the scene of the shooting. (Id.). He further contends that there was no evidence that the actual shooter was Mincy's cousin. (Id.).

This issue was pursued in the PCRA proceedings and there was no prejudice found. The evidence of record supports this finding. In referring to Mincy's accomplice in the jury instructions, the trial court made the following statements:

> "Let me say to you that the Commonwealth's theory is that the Defendant on this evening was working in a conspiracy with – I will refer to the other individual as an unknown black male. There's been some reference whether he was a cousin or not of the defendant." (Doc. 9-10, p. 51).
>
> "Now my final instruction on the conspiracy

> concept, I do want to point out to you if you do believe the Defendant's cousin or the unknown black male committed the crime or crimes. . . ." (Doc. 9-10, p. 55).

The trial court clearly indicated that there was contradictory evidence concerning whether the accomplice was Mincy's cousin and therefore, alternatively identified the individual as "an unknown black male." (Doc. 9-10, p. 51). As noted by the PCRA court, the trial court never expressly stated that the accomplice was, in fact, Mincy's cousin. Further, as recognized by the superior court, Mincy was clearly identified as one of the assailants and the identity of the companion did not alter Mincy's guilt. Accordingly, his request for relief on this ground will be denied.

(b) Appellate Counsel

He also argues that appellate counsel was ineffective for failing to raise and preserve the issue of the trial court's improper reference to Mincy's cousin as the actual shooter in the jury instructions. As noted above, because the trial court never stated that the accomplice was, in fact, Mincy's cousin, there is no merit to this claim.

2. PCRA Court Abuse of Discretion

Mincy argues that the PCRA court erroneously denied his request for an evidentiary hearing because "[w]hen a prisoner alleges the ineffective assistance of counsel and makes credible allegations against counsel, he has a right to an evidentiary

hearing in order to prove his claims." (Doc. 1, p. 15). It is unclear whether Mincy is mounting a challenge based upon Section 2254(d)(1) or (d)(2). For the sake of completeness, the court will evaluate the argument under both standards.

Mincy fails to cite to a single case in support of his argument. Consequently, he is unable to to [sic] establish that the state courts' decisions to deny him an evidentiary hearing were contrary to, or involved unreasonable applications of, clearly established Federal law, as determined by the Supreme Court of the United States: Despite Mincy's failure to meet his burden, review has been undertaken of Pennsylvania statutes, and the court has been unable to find any statutory support for Mincy's contention. Nor has the court located a single case that suggests that a post-conviction court's decision not to hold an evidentiary hearing, when requirements set forth by statute are not met, is in violation of clearly established Federal law.

With respect to the evidence presented, the PCRA court based its denial of an evidentiary hearing on Mincy's failure to comply with the procedural requirements set forth in 42 Pa.C.S.A. § 9545(d)(1). It is undisputed that he failed to provide the required information, and he does not argue otherwise. Mincy therefore is not entitled to relief.

Although the PCRA court decided not to hold an evidentiary hearing, the ineffective assistance of counsel claim was considered, and the court concluded that Mincy was not eligible for relief because the issue was previously litigated, 42 Pa.Cons.Stat. § 9544(b). (Doc. 9-3, p. 6). Specifically, trial counsel's failure to investigate or call witnesses was rejected on

the merits during the direct appeal. The PCRA court's conclusion was affirmed by the superior court on appeal.

IV. Conclusion

Based on the foregoing determination that a portion of Mincy's claims are procedurally defaulted, and that the remaining claims (which are fully exhausted and properly considered on the merits) are meritless, the petition for writ of habeas corpus will be denied.

An appropriate order will issue.

/s/ Christopher C. Conner
CHRISTOPHER C. CONNER
United States District Judge

Dated: May 18, 2006

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

HILTON MINCY,	: CIVIL ACTION NO. 1:05-CV-
Petitioner	: 0273
	:
v.	: (Judge Conner)
	:
SUPERINTENDENT,	:
STATE CORRECTIONAL	:
INSTITUTION MAHANOY	:
PENNSYLVANIA, et al.,	:
Respondents	:

ORDER

AND NOW, this 18th day of May, 2006, upon consideration of the petition for writ of habeas corpus (Doc. 1), and for the reasons set forth in the accompanying memorandum, it is hereby ORDERED that:

1. The petition for writ of habeas corpus is DENIED.

2. The Clerk of Court is directed to CLOSE this case.

3. There is no basis for the issuance of a certificate of appealability. See 28 U.S.C. § 2253c.

/s/ Christopher C. Conner
CHRISTOPHER C. CONNER
United States District Judge